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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 ENVTECH, INC.,

Case No. 3:17-cv-00078-MMD-WGC

10 Plaintiff,

ORDER

11 v.

12 PETROCHEM FIELD SERVICES, INC.,

13 Defendant.

14 **I. SUMMARY**

15 This case concerns a contract dispute between a manufacturer of cleaning
16 supplies for oil refineries and a refinery services company. Before the Court is Defendant
17 Petrochem Field Services, Inc.'s ("Petrochem") Motion to Dismiss for Lack of Personal
18 Jurisdiction ("Motion"). (ECF No. 7.) The Court has reviewed Plaintiff EnvTech, Inc.'s
19 ("EnvTech") response (ECF No. 11) and Petrochem's reply (ECF No. 16). For the reasons
20 discussed below, Petrochem's Motion to Dismiss is granted.

21 **II. BACKGROUND**

22 EnvTech initially filed its complaint in the Second Judicial District Court of Washoe
23 County on December 22, 2016. (ECF No. 1-1.) Petrochem then removed the case to this
24 Court on February 6, 2017, on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a).
25 (ECF No. 1.) The following facts are taken from the complaint (ECF No. 1-1).

26 EnvTech is a Nevada-based company that produces and sells chemicals used to
27 clean oil and gas refineries. Petrochem is a Texas-based company that installs, modifies,
28 and cleans towers and vessels at refineries. Petrochem began purchasing chemicals from

1 EnvTech in 2010 and continued to do so until 2014. During that period, Petrochem would
2 contact EnvTech in Nevada in order to create a purchase order. EnvTech would then
3 invoice Petrochem and, most often,¹ deliver the chemicals. Generally, Petrochem would
4 pay approximately half of the cost of the chemicals up front. Shortly after delivery,
5 Petrochem would then pay EnvTech the remaining amount.

6 Around April of 2014, Petrochem ordered \$575,900 worth of chemicals. The
7 purchase order was officially placed on May 7, 2014, and specified that payment was due
8 within “net 30 days.” Petrochem made a partial payment of \$287,980. In early July 2014,
9 before paying off the outstanding balance, Petrochem placed an additional order for
10 \$248,980 worth of chemicals. The order was memorialized in an email from Paul Stanco
11 at EnvTech to several employees at Petrochem on July 14, 2014, and an invoice was
12 created on that date for the order. Shortly thereafter, EnvTech shipped the chemicals out
13 of Nevada to Petrochem. Petrochem did not object to the chemicals it received for the
14 May 7, 2014, invoice or the July 14, 2014, invoice.

15 Despite accepting these orders, Petrochem never paid EnvTech the outstanding
16 balances of \$287,920 (May 7, 2014, order) or \$248,980 (July 14, 2014, order). EnvTech
17 is now suing Petrochem in order to recover the outstanding amounts owed and any
18 accompanying damages.

19 The complaint asserts three claims for relief: (1) breach of contract; (2) breach of
20 the implied covenant of good faith and fair dealing; and (3) unjust enrichment. (ECF No.
21 1-1 at 4-5.)

22 **III. LEGAL STANDARD**

23 In opposing a defendant’s motion to dismiss for lack of personal jurisdiction, a
24 plaintiff bears the burden of establishing that jurisdiction is proper. *Boschetto v. Hansing*,
25 539 F.3d 1011, 1015 (9th Cir. 2008). Where, as here, the defendant’s motions are based
26 on written materials rather than an evidentiary hearing, “the plaintiff need only make ‘a

27 ¹According to EnvTech, Petrochem had the chemicals picked up for the fourth
28 transaction in April of 2012. (ECF No. 11 at 6.)

1 prima facie showing of jurisdictional facts to withstand the motion to dismiss.” *Brayton*
2 *Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010) (quoting
3 *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006)). The plaintiff cannot
4 “simply rest on the bare allegations of its complaint,” but uncontroverted allegations in the
5 complaint must be taken as true. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d
6 797, 800 (9th Cir. 2004) (quoting *Amba Mktg. Sys., Inc. v. Jobar Int’l, Inc.*, 551 F.2d 784,
7 787 (9th Cir. 1977)). The court “may not assume the truth of allegations in a pleading
8 which are contradicted by affidavit,” *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d
9 1280, 1284 (9th Cir. 1977), but it may resolve factual disputes in the plaintiff’s favor.
10 *Pebble Beach Co.*, 453 F.3d at 1154.

11 **IV. DISCUSSION**

12 A two-part analysis governs whether a court retains personal jurisdiction over a
13 nonresident defendant. “First, the exercise of jurisdiction must satisfy the requirements of
14 the applicable state long-arm statute.” *Chan v. Soc’y Expeditions*, 39 F.3d 1398, 1404
15 (9th Cir. 1994). Since “Nevada’s long-arm statute, NRS [§] 14.065, reaches the limits of
16 due process set by the United States Constitution,” the Court moves on to the second
17 part of the analysis. See *Baker v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 999
18 P.2d 1020, 1023 (Nev. 2000). “Second, the exercise of jurisdiction must comport with
19 federal due process.” *Chan*, 39 F.3d at 1404-05. “Due process requires that nonresident
20 defendants have certain minimum contacts with the forum state so that the exercise of
21 jurisdiction does not offend traditional notions of fair play and substantial justice.” *Id.* at
22 1405 (citing *Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945)). Courts analyze this
23 constitutional question with reference to two forms of jurisdiction: general and specific
24 jurisdiction.

25 EnvTech argues that this Court has specific jurisdiction² over Petrochem because
26 Petrochem purposefully consummated transactions with Nevada, thereby having several

27 ²EnvTech’s response focuses solely on specific jurisdiction thereby conceding that
28 there is no general jurisdiction over Petrochem in the state of Nevada.

1 contacts with the state, and EnvTech's breach-of-contract claims arise directly from these
2 transactions. (ECF No. 11 at 10-17.) The Court disagrees.

3 Specific jurisdiction exists where "[a] nonresident defendant's discrete, isolated
4 contacts with the forum support jurisdiction on a cause of action arising directly out of its
5 forum contacts." *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1075 (9th Cir.
6 2011). Courts use a three-prong test to determine whether specific jurisdiction exists over
7 a particular cause of action: "(1) The non-resident defendant must purposefully direct his
8 activities or consummate some transaction with the forum or resident thereof; or perform
9 some act by which he purposefully avails himself of the privilege of conducting activities
10 in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must
11 be one which arises out of or relates to the defendant's forum-related activities; and (3)
12 the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must
13 be reasonable." *Id.* at 1076 (quoting *Schwarzenegger*, 374 F.3d at 802). The party
14 asserting jurisdiction bears the burden of satisfying the first two prongs. *Id.* (citing *Sher v.*
15 *Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990)). If it does so, the burden shifts to the party
16 challenging jurisdiction to set forth a "compelling case" that the exercise of jurisdiction
17 would be unreasonable. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-
18 78 (1985)). The plaintiff bears the burden of showing that jurisdiction is proper by a
19 preponderance of the evidence. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d
20 834, 839 (9th Cir. 1986) (internal citations omitted).

21 EnvTech fails to meet the first prong of the specific jurisdiction analysis. In
22 particular, EnvTech has not shown that Petrochem purposefully availed itself of the
23 benefits and protections of Nevada's laws with regard to the two transactions at issue in
24 this action.

25 "In a breach of contract action, the purposeful availment requirement is satisfied if
26 the defendant has taken deliberate action within the forum state or if he has created
27 continuing obligations to forum residents." *CE Distribution, LLC V. New Sensor Corp.*,
28 380 F.3d 1107, 1113 (9th Cir. 2004) (quoting *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th

1 Cir. 1995)) (internal quotation marks omitted). By itself, entering into a contract with a
2 resident of the forum state is insufficient to subject a nonresident defendant to personal
3 jurisdiction. *Picot v. Weston*, 780 F.3d 1206, 1212-13 (9th Cir. 2015). However, “if the
4 defendant directly solicits business in the forum state, the resulting transactions will
5 *probably* constitute the deliberate transaction of business invoking the benefits of the
6 forum state’s laws.” *Decker Coal Co.*, 805 F.2d at 840 (emphasis added). The “practice
7 of mailing or making payment in the forum state does not weigh heavily in the calculus of
8 contacts.” *Hupe v. Mani*, No. 2:16-cv-00533-GMN-VCF, 2016 WL 3690093, at *3 (D. Nev.
9 July 12, 2016) (internal quotation marks and citation omitted). In determining whether a
10 party purposefully availed itself of the benefits and protections of the forum state, the court
11 may consider prior negotiations, contemplated future consequences, the terms of the
12 contract, and the parties actual course of dealing. *Burger King*, 471 U.S. at 479.

13 EnvTech relies heavily on the prior transactions that occurred between the two
14 companies to argue that Petrochem purposefully availed itself of the privilege of doing
15 business with a Nevada corporation and, therefore, with the state of Nevada. These prior
16 transactions consist of five stand-alone purchases. These transactions were not part of
17 an ongoing contractual relationship between the two parties that required Petrochem to
18 continue to buy chemicals from EnvTech.³ (See ECF No. 11 at 5-7.) Generally, when
19 transacting, Petrochem would submit a purchase order to EnvTech by email and EnvTech
20 would then email back an invoice.⁴ (See ECF No. 11-1 at 2-5.) Petrochem’s payments to
21 EnvTech were then made by way of wire transfer to EnvTech’s Nevada-based bank
22 account. On one occasion, Petrochem sent an employee to Nevada to supervise the

23 ³The fifth transaction occurred after the two parties entered into an exclusivity
24 agreement. However, the agreement was terminated within a few months of being
25 entered into because Petrochem returned the chemicals obtained during the fifth
transaction and did not compensate EnvTech for the cost of shipping and picking them
up in Texas. (ECF No. 11 at 6.)

26 ⁴In its reply, Petrochem disputes whether it initiated the transaction with EnvTech.
27 (ECF No. 16 at 5.) However, even if Petrochem initiated the two transactions at issue in
28 this case, this fact is irrelevant as each transaction was considered a stand-alone
transaction, and EnvTech does not claim that there was an ongoing business relationship
between the two that would create continuing obligations.

1 shipment of an order. (See *id.* at 2-3.) In addition, on two occasions Petrochem and
2 EnvTech entered into an exclusivity agreement, but the agreements were both cancelled
3 by the time of the next transaction. (See *id.* at 4-5; see also ECF No. 11 at 6-7.) None of
4 these facts establish that Petrochem availed itself of the protections and benefits of
5 Nevada's laws when making the two transactions at issue in this action, or that
6 performance of the transactions by Petrochem required them to engage in any substantial
7 business in Nevada. See *Boschetto v. Hansing*, 539 F.3d 1011, 1017 (9th Cir. 2008). The
8 two transactions at issue required only that Petrochem pay EnvTech for the chemicals
9 and cost of shipment upon delivery of the items in Texas.

10 Cumulatively, the facts presented by EnvTech establish only the existence of a
11 prior business relationship between the two companies. The two transactions at issue in
12 this action were established through phone calls and emails, and the chemicals were
13 delivered to Texas, which is insufficient to render personal jurisdiction over Petrochem.
14 EnvTech has presented no evidence that these transactions or the exclusivity agreement⁵
15 that existed around the time of the final transaction were governed by Nevada law or
16 required Petrochem to perform substantial business in the state of Nevada. In addition,
17 all the transactions appear to have been treated as out-of-state sales⁶ (see, e.g., ECF
18 No. 11-1 at 10, 12, 24, 43, 48, 60, 72), which further supports the fact that Nevada's laws
19 did not govern the two transactions at issue in this dispute.

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21 ⁵The existence of an exclusivity agreement may lend support to a finding of specific
22 personal jurisdiction, but the breach of contract claims at issue in this action do not arise
23 from breach of either the January 2013 agreement or the July 2014 agreement. (See ECF
24 No. 11 at 6-7.)

25 ⁶the two transactions at issue involved purchase orders specifying "F.O.B.", which
26 EnvTech does not dispute. (ECF No. 16 at 6.) In an F.O.B. contract, "[t]he seller's delivery
27 is complete (and the risk of loss passes to the buyer) when the goods pass into the
28 transporter's possession." Free on Board, Black's Law Dictionary (10th ed. 2014). The
Ninth Circuit has not determined whether F.O.B. shipments are sufficient to establish
minimum contacts in the forum state. See *Aurora Corp. of America v. Michelin Prosperity
Co., Ltd.*, No. CV 13-03516 RSWL (JCx), 2015 WL 5768340, at *6 (C.D. Cal. Sept. 29,
2015). While other factors must be present, F.O.B. shipments lend support to the
destination state being the proper forum for disputes arising from those transactions. See
id.

1 EnvTech has failed to meet its prima facie burden of establishing that jurisdiction
2 in the state of Nevada is proper. Therefore, the Court may not exercise specific jurisdiction
3 over Petrochem.

4 **V. CONCLUSION**

5 The Court notes that the parties made several arguments and cited to several
6 cases not discussed above. The Court has reviewed these arguments and cases and
7 determines that they do not warrant discussion as they do not affect the outcome of
8 Petrochem's Motion.

9 It is therefore ordered that Petrochem's Motion to Dismiss (ECF No. 7) is granted.
10 Claims against Petrochem are dismissed for lack of jurisdiction.

11 The Clerk is directed to close this case.

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13 DATED THIS 1st day of August 2017.

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16 MIRANDA M. DU
17 UNITED STATES DISTRICT JUDGE
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